No. 92-74

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF REVENUE OF OREGON, and
RICHARD MUNN, in his capacity as Director
of the Department of Revenue,
Petitioners,

v.

ACF INDUSTRIES, INC.;
GENERAL AMERICAN TRANSPORTATION CORP.;
GENERAL ELECTRIC RAILCAR SERVICES CORP.;
PULLMAN LEASING CO.; RAILBOX CO.; RAILGON CO.;
TRAILER TRAIN CO.; and UNION TANK CAR CO.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, JOINED BY THE MULTISTATE TAX COMMISSION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici will address the following question:

Whether 49 U.S.C. § 11503(b)(4) prohibits States from pursuing legitimate state interests through granting property-tax exemptions to various classes of property not owned or used by interstate railroads.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. Among the most important of such issues are those raised by federal limitations on state and local taxing authority, such as the antidiscrimination provision of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), 49 U.S.C. § 11503. The decision of the Ninth Circuit in this case, holding that Section 11503 is violated whenever a state or local taxing authority exempts from its property tax any (non-*de minimis*) class of property not used by railroads, would require either the elimination of property-tax exemptions prevalent in virtually every State (serving legitimate interests having nothing to do with railroads) or the grant to railroads of broad immunity from normal property taxes (causing severe fiscal losses to state and local governments). With more than $100 million in annual tax revenues at stake (*see* Amended Br. of Multistate Tax Commission (at petition stage) at 13-14), the decision presents a grave threat to the existing tax schemes, revenue-raising powers, and legislative discretion of state and local governments. *Amici* have a vital interest in seeing that this misconstruction of the 4R Act is corrected.[1]

STATEMENT

1. *The 4R Act.* As part of the 4R Act's broad effort to revitalize the Nation's railroads, Congress enacted "a prohibition on discriminatory state taxation of railroad property." *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987). Congress was concerned that discriminatory taxes were placing excessive

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

burdens on railroads because "interstate carriers 'are easy prey for State and local tax assessors' in that they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 (1987) (quoting S. Rep. 630, 91st Cong., 1st Sess. 3 (1969)); H.R. Rep. 725, 94th Cong., 1st Sess. 78 (1975). The prohibition on discriminatory taxation was enacted as Section 306 of the 4R Act, Pub. L. No. 94-210, 90 Stat. 54. The provision was subsequently recodified, with a declared intent to make no substantive change, as 49 U.S.C. § 11503. *See* Revised Interstate Commerce Act, §§ 11101, 11503, 3(a), Pub. L. No. 95-473, 92 Stat. 1419, 1445, 1466; *Burlington Northern R.R.*, 481 U.S. at 457 n.1.

The structure of Section 11503 is simple. Subsection (a) defines critical terms. Subsection (b) sets forth the prohibitions on discrimination. Subsection (c) then lifts the jurisdictional bar of the Tax Injunction Act, 28 U.S.C. § 1341, in specified circumstances to permit direct enforcement of the statute by federal district courts.

The operative antidiscrimination provision, subsection (b), is itself simple in structure. Subsections (b)(1) through (b)(3) bar discrimination in each of the steps involved in property taxation: (b)(1) forbids *assessment* of rail transportation property at a higher ratio of its true market value than the ratio at which other "commercial and industrial property" is assessed; (b)(2) forbids *levy* of a tax based on such a disparate assessment; and (b)(3) forbids higher tax *rates* for rail transportation property than for other "commercial and industrial property." (The critical term "commercial and industrial property" is specifically limited to property that is actually "subject to a property tax levy." § 11503(a)(4).) Subsection (b)(4) then forbids a taxing authority to "impose another tax that discriminates against a rail carrier" (*i.e.*,

an interstate carrier).[2] It is the meaning of this last provision that is at issue in this case.

2. *District Court Proceedings.* Oregon imposes an ad valorem tax on all real and personal property that is not expressly exempted. Pet. App. 5a. The State exempts various types of personal property, including agricultural machinery and equipment, business inventories, livestock, poultry, bees, fur-bearing animals, and agricultural products in the possession of farmers. J.A. 17. The State also exempts motor vehicles from property taxation, but it imposes registration fees in lieu of such taxes. J.A. 18. In like manner, standing timber is exempt from the real-property tax but is subject to a separate severance tax. *Ibid.* Railroad cars, which are classified as personal property, are subject to Oregon's property tax and, like all personal property, are assessed at their full market value. Pet. App. 5a.

Respondents are eight companies engaged in the business of leasing railroad cars to railroads and to shippers. Pet. App. 22a. These "carlines" brought suit in federal district court alleging that Oregon's imposition of a property tax on their railroad cars, compared with the exemption from property tax of certain classes of personal property not owned or used by rail carriers, constituted unlawful discrimination under Section 11503. Although the railroad cars are "rail transportation property" covered by the statute's explicit prohibitions on discriminatory assessments, levies, and rates (§ 11503(b)(1)-(3)),[3] respondents did not bring their challenge under those provisions, presumably because the comparison class for purposes of those prohibitions, "commercial and industrial

[2] The original language of Subsection (b)(4)'s predecessor, Section 306(1)(d) of the 4R Act, prohibited "[t]he imposition of any other tax which results in discriminatory treatment of a common carrier by railroad."

[3] Subsection 11503(a)(3) defines "rail transportation property" to mean property "owned or used by a rail carrier."

property," is expressly defined to include only property that is "subject to a property tax levy" (§ 11503(a)(4)), thereby excluding exempt property. *See* U.S. Br. 5 n.10 (exemptions are not actionable under (b)(1)-(3) because of the explicit definition of "commercial and industrial property" in (a)(4)). Instead, respondents alleged that Oregon's property tax, with its exemption of various types of non-railroad property, is "another tax that discriminates against a rail carrier," in violation of subsection (b)(4). J.A. 8-9 (Complaint).

The district court rejected the challenge. Pet. App. 21a-33a. The court first held that respondents, although not themselves rail carriers, had standing to allege discrimination under (b)(4) because of their "close connections" to the rail carriers—a ruling not at issue in this Court. *See* Pet. App. 25a-28a; Pet. 5 n.5. The court then held that Oregon's tax exemptions did not discriminate against railroads. No *de jure* discrimination is present, the court explained, because all personal property that is taxed is assessed at 100% of its value and is taxed at the same rate. Pet. App. 28a. Nor does *de facto* discrimination exist, the court reasoned: Oregon has not engaged in " 'backdoor' discrimination" by, for example, "exempting all taxpayers except railroads" (Pet. App. 32a, 29a); rather, Oregon's exemption "scheme is neutral in application and there is no evidence that Oregon's tax system lacks an independently valid purpose." Pet. App. 32a.

3. *Court of Appeals Decision.* The court of appeals reversed, concluding that "any exemption not also available to railroads violates the statute, with the possible qualification that a *de minimis* level of exemption available only to other taxpayers may not state a claim under [§ 11503(b)(4)]." Pet. App. 17a.[4] The court began by

[4] While noting that petitioners had "apparently abandoned" the contention that respondents lacked standing to challenge an alleged discrimination against rail carriers, the Ninth Circuit evidently rejected the contention: "Section 306(1)(d) prohibits any tax

holding that, although property-tax discrimination is specifically addressed in each of subsections (b)(1) through (b)(3), property taxes are also actionable under subsection (b)(4)'s prohibition on discrimination in "another tax." Pet. App. 9a-13a. Subsection (b)(4) "must be read broadly," the court reasoned, to effectuate congressional intent and to "prohibit the states from doing indirectly what [subsections (b)(1) and (3)] prohibit them from doing directly." Pet. App. 13a. Moreover, the court concluded, although exemptions are not subject to challenge under subsections (b)(1) through (b)(3), they are subject to challenge under (b)(4). Pet. App. 13a-16a.

As to the substance of (b)(4)'s prohibition, the court then held, with virtually no explanation, that "[t]he most natural reading of th[e provision's] language is that the statute is violated by *any* exemption given to other taxpayers but not to railroads." Pet. App. 16a. The court stated that there might be a *de minimis* exception "to the statute's apparently absolute prohibition" (*id.* at 17a), but it declined to decide whether such an exception exists because at least "25% of non-railroad real and personal property is exempt" from Oregon's property tax (*id.* at 18a). The court remanded the case for entry of an injunction prohibiting Oregon's "collection of the ad valorem tax on the Carlines' property." Pet. App. 19a.

SUMMARY OF ARGUMENT

Section 11503(b)(4) forbids a State or its subdivisions to "impose another tax that discriminates against" interstate rail carriers. The Ninth Circuit read the provision to invalidate any property-tax exemption not available to railroads. That reading is plainly incorrect. And a

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that *results* in discriminatory treatment of a common carrier by railroad, even if the effect is indirect. Without a doubt, if Oregon's tax exemption scheme discriminates against the Carlines, it also 'results' in discrimination against the railroads." Pet. App. 7a n.2.

proper reading of the provision readily demonstrates the validity of Oregon's system of property-tax exemptions—for two separate reasons: the property tax is not "another tax"; and it does not "discriminate[] against" railroads.

The Ninth Circuit's interpretation must be rejected because it is flatly inconsistent with other parts of the same section. In defining the objective disparate-impact tests for property taxes set out in (b)(1)-(3), Congress carefully specified that the comparison class, "commercial and industrial property," excludes exempt property, thereby preserving the freedom of state and local governments to pursue traditional policies through the granting of tax exemptions. The Ninth Circuit's construction of (b)(4) nullifies that choice by re-introducing into the statute precisely the objective, disparate-impact test for exemptions that Congress expressly repudiated.

Once the Ninth Circuit reading is discarded, it is clear that (b)(4) is properly construed to require rejection of respondents' challenge to Oregon's statutory property-tax exemptions. One reason is that (b)(4) applies only to "another tax," and that phrase is naturally read—coming as it does after the specific restrictions on property taxes set forth in (b)(1) through (b)(3)—as limiting (b)(4) to taxes other than property taxes. This interpretation, in addition to according with the plain meaning of the language, makes structural sense in light of Congress's evident attempt to deal comprehensively with property taxes in (b)(1)-(3). And it comports with the evidence that Congress added (b)(4) to address "in-lieu" taxes, *i.e.*, non-property taxes imposed as a substitute for property taxes.

The second, independent reason for rejection of respondents' challenge is that subsection (b)(4)'s "discriminates against [railroads]" language is properly read not to apply to state tax classifications that serve legitimate policies independent of any disadvantaging of railroads.

This reading is supported not only by the principle that federal restrictions on core state powers should be narrowly construed, but also by the appropriateness, under Section 11503's express terms, of borrowing from the Commerce Clause standards for "discrimination" in construing (b)(4). Those standards bar only facial or other purposeful discrimination plus a narrow class of state measures that simply cannot be explained on the basis of any plausible state policy aside from the forbidden discriminatory policy. Oregon's tax exemptions, which make no reference to railroads, are obviously non-discriminatory under such principles, because they are readily seen to serve legitimate state interests without regard to their effect on railroads.

ARGUMENT

SECTION 11503(b)(4) DOES NOT PROHIBIT STATES FROM PURSUING LEGITIMATE STATE INTERESTS THROUGH GRANTING PROPERTY-TAX EXEMPTIONS TO NON-RAILROAD PROPERTY

The Ninth Circuit's decision is wrong, both in its interpretation of Section 11503(b)(4) and in its holding. Its interpretation of (b)(4), as embodying a pure disparate-effects standard and therefore forbidding any exemptions that happen to be unavailable to railroads, is incorrect for the simple and sufficient reason that it contradicts other parts of the same section.[5] Moreover, under a proper interpretation of (b)(4), the Ninth Circuit's holding that Oregon's exemption system is invalid is incorrect for two reasons. First, subsection (b)(4) is properly read as not applying to property taxes. Second, a tax scheme does not "discriminate[] against a rail carrier" under (b)(4) unless it singles out railroads for adverse

[5] Because the Ninth Circuit rule is incorrect regardless of whether there is a *de minimis* exception to it, we omit mention of the possibility of such an exception in describing the Ninth Circuit's rule.

treatment on its face, intentionally, or without any independent legitimate justification.

These conclusions follow from straightforward statutory analysis, but it is worth noting that they are reinforced by the special interpretive principle applicable to express preemption provisions. Section 11503 explicitly sets federal limits on the legislative authority of state and local governments. It does so, moreover, in an area—taxation—historically and functionally central to the sovereign powers of States. *See, e.g.*, 28 U.S.C. § 1341 (Tax Injunction Act); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 37 (1990); *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981). Accordingly, the provision must be construed in light of the well-established presumption against preemption of traditional state powers. *See, e.g., Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617-18 (1992); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). The statute must be given a "fair but narrow reading." *Cipollone*, 112 S. Ct. at 2621 (opinion of Justice Stevens, joined by Chief Justice Rehnquist, Justice White, and Justice O'Connor); *id.* at 2626 (opinion of Justice Blackmun, joined by Justice Kennedy and Justice Souter) (where statutory language is ambiguous, Court does not, "absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language") (footnote omitted); *see also Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400, 2404 (1991). In short, if there are two permissible readings of the statute, the one less restrictive of state authority is to be preferred.

A. Section 11503(b)(4) Cannot Be Read to Preclude States from Granting Property-Tax Exemptions to Non-Railroad Property.

The Ninth Circuit held that a State's granting of "any exemption not also available to railroads" unlawfully dis-

criminates against railroads in violation of Section 11503 (b)(4). Pet. App. 17a. Whatever else subsection (b)(4)'s bar on discrimination may mean, however, it cannot mean what the Ninth Circuit held. That purely objective disparate-effects test for exemptions would directly nullify Congress's explicit decision, in defining "commercial and industrial property," to exclude exempt property from the objective disparate-effects tests set forth for property-tax discrimination in (b)(1)-(3). The Ninth Circuit ruling thus violates the fundamental principle that a statutory provision cannot be read to override the clear congressional choice embodied in another provision of the statute, much less in the same section. *See, e.g., Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) (" 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative' ") (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979)).[6]

Whenever a taxing authority grants an exemption to non-railroad property, that property is being assessed at 0% of its market value and taxed at a 0% rate. If that property were included among the "commercial and industrial property" in the assessment jurisdiction, and all other such property were assessed and taxed at the same ratio and rate as railroad property, then by mathematical necessity there would be both assessment and rate discrimination in violation of (b)(1)-(3): the 0% ratio and

[6] *See also United Savings Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 374-75 (1988) (interpretation of provision rejected as "structurally inconsistent" with other provision); *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) ("courts should disfavor interpretations of statutes that render language superfluous"); *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2383-84 (1992) (citing "duty 'to give effect, if possible, to every clause and word of a statute,' " Court rejects interpretation of provision that, though "plausible . . . in isolation," "is not tenable in light of . . . surrounding provisions") (citation omitted).

rate bring down the average ratios and rates of the "commercial and industrial property" with which railroad property must be compared under (b)(1)-(3). Under the strict, objective comparisons of (b)(1)-(3), therefore, exemptions not available to railroads would be illegal—or would have to be carefully offset by selecting some non-railroad taxpayers for higher assessments or rates than railroads—*if* the comparison class, "commercial and industrial property," required inclusion of exempted property.[7] In other words, the Ninth Circuit's ruling is precisely equivalent to treating the comparison class for (b)(1)-(3) as including exempt property.

As respondents correctly recognized in bringing their challenge only under (b)(4), however, Congress specifically decided not to include exempt property in the comparison class for the objective discrimination bars of subsections (b)(1)-(3). *See* J.A. 8-9 (Complaint); *see also* Pet. App. 8a-9a (Ninth Circuit opinion, apparently accepting same conclusion); U.S. Br. 5 n.10 (recognizing inapplicability of (b)(1)-(3) to exempt property). Congress defined "commercial and industrial property" to include only property "subject to a property tax levy" (§ 11503(a)(4)), which, in its plain meaning, restricts the covered property to that which is actually taxed. A different phrase, "subject to property tax," might conceivably have excluded only property that is *incapable* of being taxed by a State or its subdivision—because, for example, of federal immunity or some other preemption. By insisting instead that the property actually be "subject to a property tax levy," Congress unmistakably limited the comparison class to property that the taxing authority actually taxed, thus excluding property exempt

[7] All exemptions would be flatly illegal if (b)(3)'s prohibition on subjecting railroads to "a tax rate that exceeds the tax rate applicable to commercial and industrial property" were read, not to look to an average of rates applicable to commercial and industrial property, but to forbid any rate disparity between railroads and *any* other such property.

from taxation.[8] *See also* § 11503(b)(2) (using "levy or collect" to refer to actual imposition of tax on a disparate assessment); § 11503(c) ("all other property *subject to a property tax levy*" is the comparison class in the event that the assessment ratio cannot be determined for "commercial and industrial property" using a "sales assessment ratio study") (emphasis added).

That Congress in fact intended to exclude exempt property from (b)(1)-(3) may be inferred from the extreme, immediate, and radically disruptive consequences of reading the statute any other way. If exempt property were included in the comparison class, States and their subdivisions would be effectively barred from granting property-tax exemptions for traditional purposes such as encouraging particular businesses, eliminating undue administrative burdens, or substituting alternative taxes that are less easily avoided (by, *e.g.*, moving property out of the jurisdiction); otherwise, the taxing authorities would have to grant railroads automatic "most favored taxpayer" status or engage in an arbitrary process of raising tax rates (or assessment ratios) for a selected number of non-railroads to offset any retained or new exemption. At least in the absence of clear evidence, Congress must be presumed not to be working such an interference with state prerogatives and practices.

Not surprisingly, the legislative history confirms that Congress wrote the definition of "commercial and industrial property" to prevent such results. Thus, the 1969 Senate precursor of the 4R Act referred to "any other property" as the comparison class, though even then, the Senate Committee Report stated that "property totally or partially exempted is not intended to be taken as a measure of" the comparison class. S. Rep. 630, 91st Cong., 1st Sess. 11 (1969). Various witnesses urged Congress to restrict the comparison class by adding "subject to a property tax levy" or a similar phrase to the statutory text, precisely in order to protect the ability of States and localities to grant exemptions for traditional policy reasons "completely unrelated to any deliberate discrimination against common carriers."[9] The "subject to" language then became part of the bill, S. 2718, 94th Cong., 1st Sess. (1975), that passed the Senate in 1975, was accepted in conference, and was enacted into law in the 1976 4R Act. 121 Cong. Rec. 38499 (1975); S. Conf. Rep. 585, 94th Cong., 1st Sess. 166 (1975).[10]

In short, Congress made a deliberate choice to avoid the very crippling of States' exemption-granting authority that the Ninth Circuit has now required. Thus, when the Ninth Circuit said that its reading of (b)(4) was needed to "prohibit the states from doing indirectly what [subsections (b)(1) and (3)] prohibit them from doing directly" (Pet. App. 13a), it got matters backwards. Subsections (b)(1) through (b)(3) could not be clearer

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[8] It is hardly a novel idea that equality guarantees in taxation should exclude exempt property from consideration: a leading text notes that this practice occurs under at least some state-law equalization requirements. *See* J. Hellerstein & W. Hellerstein, *State and Local Taxation* 68-69 (5th ed. 1988).

[9] *State Tax Discrimination Against Interstate Carrier Property, 1969: Hearing on S. 2289 Before the Subcomm. on Surface Transportation of the Sen. Commerce Comm.*, 91st Cong., 1st Sess. 101 (1969); *id.* at 70, 86; *Common and Contract Carrier State Property Tax Discrimination, 1970: Hearing on H.R. 16245 et al. Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 90, 94 (1970).

There is no indication, by contrast, that the "subject to" phrase was meant to remove from the comparison class only property, such as federally immunized property, that state and local governments are legally incapable of taxing.

[10] At the same time that the House accepted this limitation on the scope of the antidiscrimination provision, the Senate receded from its provision permitting States to preserve pre-existing constitutional provisions containing reasonable classifications of property for state purposes. *See* S. Conf. Rep. 585, *supra*, at 167.

that Congress meant to allow States to grant exemptions, free from the rigid objective comparison called for by those subsections. The Ninth Circuit ruling undoes that decision by reading (b)(4) to prohibit what (b)(1) through (b)(3) allow.

For that reason, the Ninth Circuit's reading of (b)(4) must be rejected if the provision can be read another way. Here, such an alternative is available. Indeed, as discussed in the next two sections, there are two independently sufficient reasons why subsection (b)(4) does not bar States from doing what Oregon has done—serving legitimate state interests by granting property-tax exemptions to non-railroad property.

B. Section 11503(b)(4) Is Properly Read as Inapplicable to Property Taxes.

Subsection (b)(4) forbids a State or its subdivision to "impose *another* tax that discriminates against" railroads (emphasis added). *See also* 4R Act, § 306(1)(d) ("any other tax"). The critical word "another" means "different or distinct from the one first named or considered." *Webster's Third New International Dictionary* 89 (1971). Because each of subsections (b)(1) through (b)(3) specifically addresses property taxes—either through explicit references to an "ad valorem property tax" or through language referring to "assessment," defined by subsection (a) to refer to "a property tax"—the natural meaning of "another tax" in (b)(4) is a tax different from a property tax.

The Ninth Circuit read (b)(4) as a genuine catch-all provision, encompassing even the types of taxes already addressed in the previous paragraphs. But that view effectively reads "another" out of the statute. Congress could easily have written (b)(4) to forbid taxing authorities to "impose *any* tax that discriminates" if it had meant to write a catch-all provision. But Congress did not use such language either in the original 4R Act or in the

recodification. Instead, Congress twice used language naturally referring to taxes different from those already addressed, *i.e.*, taxes other than property taxes.

This reading makes not only linguistic but structural sense within Section 11503(b) as a whole. Subsections (b)(1) through (b)(3) address with precision each of the three steps of the imposition of a property tax. After that comprehensive addressing of property taxes, it makes sense for the next provision to cover new, rather than old, ground—here, taxes other than property taxes.[11] After all, there is no obvious gap in (b)(1)-(3)'s coverage of property taxes for (b)(4) to fill, as any challenged discrimination in a property tax would seem, as a matter of logic (and congressional understanding), to have to reside in at least one of the components of the tax—the assessment (and levy on it) or the rate—addressed by (b)(1) through (b)(3). *See* S. Rep. 630, 91st Cong., 1st Sess. 3 (1969) ("discriminatory taxation can arise in two ways: [higher assessments and higher rates]").[12]

It is therefore hard to see what independent function (b)(4) would play as applied to property taxes. If (b)(4) is read as supplementing the protections of (b)(1)-(3) for property taxes, as the Ninth Circuit held, then it effectively furnishes means of challenging assess-

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[11] *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) ("However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment.'") (citation omitted); *Gozlon-Peretz v. United States*, 111 S. Ct. 840, 848 (1991) ("A specific provision controls over one of more general application.").

[12] As explained, respondents' challenge to Oregon's exemption scheme in this case is nothing other than a claim either about differential assessments (railroad property is assessed at full value, while exempt property is assessed at zero, bringing the average of non-railroad assessments to less than full value) or about differential rates (exempt property is taxed at 0%, making the average rate for non-railroad property less than the rate for railroad property).

ment, levy, or rate discrimination in precisely those circumstances Congress deliberately left untouched in (b)(1) through (b)(3). That function, however, is illegitimate. Subsection (b)(4) plainly makes more sense, in the context of Section 11503 as a whole, if read as applying only to taxes other than property taxes.

The legislative history supports this reading. There appears to be no authoritative indication that (b)(4) was aimed at any form of property-tax discrimination, much less one not covered by (b)(1)-(3). To the contrary, the "any other tax" language, from the time it was introduced in 1974 through its final enactment, was repeatedly described as addressed to "in-lieu" taxes, that is, non-property taxes (such as gross receipts taxes) imposed as a substitute for property taxes for particular businesses.[13] Congressional understanding of (b)(4), in short, reflects its natural meaning as covering only taxes other than property taxes.

This construction cannot be rejected based on the objection, made by the Solicitor General, that it requires "the absurd conclusion that the States may exempt all commercial property other than railroad property from its property tax base without violating the statute." U.S. Br. 11 (at petition stage). For one thing, this effort to avoid the plain meaning of "another tax" requires mischaracterization of the provision as referring to " 'any other tax' method." *Id.* at 10. The statute, however, does not pro-

[13] *Railroads—1975: Hearings Before the Subcomm. on Surface Transportation of the Sen. Commerce Comm.*, 94th Cong., 1st Sess. Part 5 at 1837 (1975) ("taxes that are in lieu of discriminatory property taxes"); *see id.* at 1883-86 (describing gross receipts tax as target of language); H.R. Rep. 1381, 93d Cong., 2d Sess. 35-36 (1974); H.R. Rep. 725, 94th Cong., 1st Sess. 76-78 (1975); S. Conf. Rep. 585, *supra*, at 166 (describing House version, identical in this respect to Senate version, as barring "the imposition of a discriminatory 'in-lieu tax' ").

scribe other "methods," but other "tax[es]," that are discriminatory. In any event, the plain meaning of the statute should not be disregarded in order to extend its reach to a hypothetical that would be independently subject to legal challenge—as the government's hypothetical, a State's singling out of interstate railroads for taxation, would be under established Commerce Clause standards (discussed below). Exclusion of such a hypothetical from a particular statute is hardly "absurd"—especially where there is no reason to think that the hypothetical is remotely a real possibility.[14] Accordingly, the evident restriction of (b)(4) to taxes other than property taxes should be respected, and respondents' challenge to Oregon's property tax scheme under (b)(4) rejected on that ground.

C. Exemptions Are Not Discriminatory Under Section 11503(b)(4) If They Can Be Justified Independently of Their Effect on Rail Carriers.

The starting point in construing Section 11503 (b)(4)'s language, "discriminates against a rail carrier," is to recognize its lack of a single plain meaning. As Professor Gunther has written of the closely related constitutional bar on "discrimination against interstate commerce," " 'discrimination' is not a self-defining term." G. Gunther, *Constitutional Law* 251 (12th ed. 1991). The phrase refers almost inescapably to facial and other purposeful discrimination (here, on the basis of status as a railroad). But it is also capable of being read, as it is sometimes (though not always) read in other contexts, to refer more broadly to mere disparate impact. *Ibid.*

[14] If the hypothetical is varied so that (say) 75% of non-railroad property is exempt, it no longer can serve an "absurdity" argument, for it is hardly unreasonable to suppose that a State could exempt high proportions of the property in its borders for entirely legitimate reasons having nothing to do with discrimination against railroads, as Congress plainly intended States to be able to do. *See* pages 12-13, *supra*.

In the context of Section 11503(b)(4), no authoritative legislative history declares Congress's specific understanding of the meaning of "discriminates." Other tools of statutory construction, however, make plain that a general disparate-impact meaning cannot be attributed to Section 11503(b)(4). Indeed, it is clear that at most the provision reaches tax measures that either discriminate against railroads on their face or purposefully or, whatever the actual legislative motive, serve no possible state policy independent of disadvantaging railroads.

To begin with, if Section 11503(b)(4) is read to apply to property taxes (*but see* Argument B, *supra*), then rejection of a general disparate-impact standard is compelled by the need to avoid a direct conflict with the congressional determination to remove property-tax exemptions from the objective comparison of (b)(1)-(3) (*see* Argument A, *supra*). In any event, even if (b)(4) covers property taxes, the presumption against inferring preemption of traditional state powers requires rejection of a general disparate-impact reading. Indeed, that presumption, which demands selection of a narrower over a broader meaning in interpreting the scope of a preemption provision, could support rejection of *any* application of (b)(4) to claims of mere disparate effects: if the equal protection clause can be read to reach only purposeful discrimination (*Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979); *Washington v. Davis*, 426 U.S. 229 (1976)), so too can (b)(4)'s "discriminates against" language. The Court need not decide that question in this case, however, because Oregon's tax scheme plainly satisfies a slightly broader standard that naturally supplies at least an outer limit on the meaning of Section 11503 (b)(4).[15]

[15] We note that a discriminatory-intent standard for (b)(4) is not precluded by this Court's statement in *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. at 463, that "Subsection (b) speaks only in terms of 'acts' which 'unreasonably burden and discriminate against interstate commerce'; nowhere does it refer to the intent of the actor." As the Court said of a different statement in a different case, "[t]his statement, like all others in our opinions, must be taken in the context in which it was made." *Air Courier Conference v. American Postal Workers Union*, 111 S. Ct. 913, 920 (1991). The claim in *Burlington Northern* involved (b)(1), with its purely objective test for discrimination in property assessments, and the Court's statement merely rejected an effort to engraft an intent requirement onto that objective test for one set of claims (those involving overvaluation of railroad property). Neither the statement nor the case addressed the meaning of (b)(4).

Nor does the language of (b)(4)'s predecessor, Section 306 (1)(d) of the 4R Act—"results in discriminatory treatment"—preclude an intent standard. Even aside from the fact that the current statutory language is different, what must "result" is "discriminatory treatment," the familiar name for an intent standard. *See Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1706 (1993). Moreover, Congress's elimination of "results" language in the recodification belies any suggestion that the language demands an effects test, a suggestion for which no other support exists and which would violate other rules of construction (as explained in text below). And, as the Ninth Circuit itself explained, the phrase has an obvious alternative significance: it enables (b)(4) to reach indirect as well as direct impositions on railroads. Pet. App. 7a n.2; note 4, *supra*.

The obvious reference for the meaning of the "discriminates" language of Section 11503(b)(4) is the Commerce Clause bar on discrimination against interstate business. After all, Section 11503 expressly frames its entire set of prohibitions as an application of that doctrine, declaring that the specified kinds of discrimination against railroads "unreasonably burden and discriminate against interstate commerce." 49 U.S.C. § 11503(b). *See also* S. Rep. 445, 87th Cong., 1st Sess. 465-74 (1961) (Doyle Report). Moreover, Congress's expressed reason for enacting a special protection for railroads, as this Court explained in *Western Air Lines*, 480 U.S. at 131, was the very concern that underlies the antidiscrimination prohibition of the Commerce Clause—out-of-state businesses, lacking the legislative representation that in-state busi-

nesses have, are "easy prey" for state legislatures.[16] Accordingly, although Commerce Clause limitations extend beyond barring discrimination (*see Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)), the discrimination standards developed under the Commerce Clause provide a proper upper bound on the reach of (b)(4).

Those standards were summarized in *Amerada Hess Corp. v. New Jersey Div. of Taxation*, 490 U.S. 66, 75 (1989), where the Court explained that "a tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." The first two categories represent two different ways of proving "disparate treatment," *i.e.*, deliberate targeting for disadvantageous treatment.[17] The third, "discriminatory effect," category is harder to define, but it is clearly a narrow one and, in the end, not radically different from or expansive of the bar on deliberate discrimination.[18] A state tax is in-

[16] The Court explained in *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984): "Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. Thus, 'when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.'" (quoting *South Carolina State Highway Dep't v. Barnwell Brothers, Inc.*, 303 U.S. 177, 185 n.2 (1938)).

[17] *See Hazen Paper Co. v. Biggins*, 113 S. Ct. at 1706; *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-66 (1977).

[18] Even in the most well-established context where a "disparate impact" standard has been adopted—Title VII, 42 U.S.C. § 2000e-2—the standard has narrowly condemned only those practices not appropriately justified independently of the forbidden basis. *See* 42 U.S.C. § 2000e-2(k); *cf. Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988) (disparate impact standard condemns practices "functionally equivalent to intentional discrimination").

valid under this prong of Commerce Clause analysis only if, regardless of any inability to identify the legislature's actual motive, a facially neutral measure has a dramatically disparate impact on out-of-state businesses with no plausible independent justification.[19]

The Court repeatedly has made clear that disparate effects are not alone enough for invalidity. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981) (no violation even though "tax burden is borne primarily by out-of-state consumers"); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88 (1987); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125-29 (1978).[20] What is needed to state a claim, as *Amerada Hess* makes clear, is the absence of any neutral basis to justify or explain the disparate effect. Thus, the Court in *Amerada Hess* rejected a discriminatory-effect argument precisely because the challenged tax's differential impact on out-of-state businesses was explainable in-

[19] Commentators have noted that the Court has focused on "discriminatory effects" as the basis for invalidating state measures under the Commerce Clause in only a few cases, and then only when the circumstances—the inherently disparate operation of a seemingly neutral classification—gave rise to a suspicion of improper motive, in the absence of any plausible legitimate independent justification for the measure. *See* Smith, *Discriminations Against Interstate Commerce*, 74 Cal. L. Rev. 1203 (1986), *cited in Amerada Hess*, 490 U.S. at 75; Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986), *cited in CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987); L. Tribe, *American Constitutional Law* § 6-17, at 453-58 (2d ed. 1988) ("claims of discriminatory taxation are judged primarily on the basis of the facial characteristics of the taxing statutes," but a few neutral measures with disparate impact have been invalidated where they lacked "sufficient justification").

[20] *Cf. Leathers v. Medlock*, 111 S. Ct. 1438, 1446, 1447 (1991) ("a differential burden on speakers is insufficient by itself to raise First Amendment concerns"; "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas").

dependently of their out-of-state character: the disparity resulted "solely from differences between the nature of their businesses, not from the location of their activities." 490 U.S. at 78. The same standard is reflected in the two cases cited by *Amerada Hess* (490 U.S. at 76) for the "effects" category: *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), which found discrimination where there was "*no other reason than* the location of its business" for a tax measure that disfavored in-state over out-of-state business (483 U.S. at 286 (emphasis added)); and *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963), which turned on "the need for equal treatment of taxpayers who *can be distinguished only* on the basis of residence" (*Williams v. Vermont*, 472 U.S. 14, 23 n.7 (1985) (emphasis added)). In brief, a challenged state measure, neutral on its face and not actually motivated by local favoritism, does not unconstitutionally discriminate against interstate commerce unless any disparate effect on out-of-state commerce is inexplicable on a plausible legitimate independent basis.[21]

This Court has adopted the same principle in its decisions applying equal protection scrutiny to state taxes challenged as discriminating against out-of-state taxpayers. "A State may not treat those within its borders unequally *solely on the basis of* their different residences or States of incorporation." *Williams v. Vermont*, 472 U.S. at 23 (emphasis added); *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117, 119 (1968); *Wheeling Steel*

[21] The Court has said that even facially discriminatory measures escape condemnation under the anti-discrimination bar of the Commerce Clause—indeed, may be viewed as not really discriminatory—if they are justified by neutral state policies. *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988); *see City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978) (state goals "may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently").

Corp. v. Glander, 337 U.S. 562, 571-72 (1949).[22] That the same standard appears in another established doctrine aimed at state exploitation of unrepresented outsiders reinforces the appropriateness of using (at most) an "independent justification" standard under Section 11503 (b)(4).[23]

Application of this standard, moreover, must respect this Court's frequently repeated insistence that "in structuring internal taxation schemes 'the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.'" *Williams v. Vermont*, 472 U.S. at 22 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)). *See Nordlinger v. Hahn*, 112 S. Ct. 2326, 2332 (1992); *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."). Legislatures may pursue a host of legitimate interests through their tax schemes, including the promotion of particular industries or the alleviation of administrative or other burdens from particular tax-

[22] The Court in *Williams* explicitly drew on the Commerce Clause principles stated in *Halliburton Oil Well Co., supra*. *See* 472 U.S. at 23 & n.7.

[23] Congress wrote subsections (b)(1) through (b)(3) in order to provide an objective, almost mechanical, test for discriminatory property taxation, in place of the more flexible standards that even then applied to the Equal Protection Clause and, since *Complete Auto*, apply to the Commerce Clause. *See* S. Rep. 630, *supra*, at 6-7. There is no indication, however, that (b)(4), with its highly general language, was written to go beyond the substantive constitutional discrimination standards. The principal function of (b)(4), then, is to enable railroads to come directly to federal court under subsection (c)'s lifting of the bar of the Tax Injunction Act. This "procedural aspect" of the anti-discrimination provision of the 4R Act was plainly a critical part of Congress's design, independently of any change of substantive standards. *See* S. Rep. 630, *supra*, at 1; *id.* at 1-15; S. Conf. Rep. 585, *supra*, at 166-67.

payers. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 512-15 (1937); *see Lehnhausen*, 410 U.S. at 359-65; *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 367-69 (1940). This Court has always given legislatures a wide berth in drawing tax classifications: the Court "has been reluctant to interfere with legislative policy decisions in this area" (*Williams*, 472 U.S. at 22) and has been "especially deferential" in reviewing the rational basis for legislative classifications apparently designed to further legitimate interests (*Nordlinger*, 112 S. Ct. at 2332). This leeway for States—rooted in tradition, federalism, and practical necessity—should apply in full to the determination under Section 11503(b)(4) of whether legitimate state interests, independent of the disfavoring of railroads, can justify a State's tax classifications.

Under the foregoing standards, Oregon's exemption scheme must be readily upheld against respondents' challenge (which the parties agreed would be decided on the stipulated record, Pet. App. 22a). None of the exemptions even mentions, much less facially discriminates against, rail carriers. Nor have respondents presented any reason even to suspect that these exemptions, individually or collectively, were enacted in order to disadvantage railroads. Indeed, each of them—like virtually any exemption for a particular business or piece of property—on its face serves an obvious state policy of affirmatively encouraging, or relieving from burdens, the beneficiary of the exemption. Each such affirmative state policy, legitimate in itself, has nothing to do with the targeting of railroads.

This is not a case, finally, where the State has found "neutral" ways to exempt all non-railroad taxpayers or otherwise, by direct or indirect means, effectively singled out rail carriers as the only remaining taxpayers. Such a situation might well lend itself to an inference of discriminatory intent; it might even more readily lend itself to a finding that, regardless of actual motive, the resulting

singling out of railroads had no justification based on any legitimate state interest, but served only to disfavor railroads. Where, however, as in this case, railroads are in the company of many other taxpayers, in-state as well as out-of-state, who do not qualify for exemptions, there is no basis for such an inference or finding. In these circumstances, Congress's concern with legislative exploitation of unrepresented interests (*Western Air Lines, Inc.*, 480 U.S. at 131) is not present.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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